Federal Communications Commission
Washington, D.C. 20554

In the Matter of

High-Cost Universal Service Support	:	WC Docket No. 05-337
Federal-State Joint Board on Universal Service	:	CC Docket No. 96-45
Lifeline and Link Up	:	WC Docket No. 03-109
Universal Service Contribution Methodology	:	WC Docket No. 06-122
Numbering Resource Optimization	:	CC Docket No. 99-200
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	:	CC Docket No. 96-98
Developing a Unified Intercarrier Compensation Regime	:	CC Docket No. 01-92
Intercarrier Compensation for ISP-Bound Traffic	:	CC Docket No. 99-68
IP-Enabled Services	:	WC Docket No. 04-36

COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

November 26, 2008

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BACKGROUND AND INTRODUCTION

On November 5, 2008, the Federal Communications Commission (FCC) took the unprecedented action of presenting three differing proposals, each addressing some or all of the dockets noted above, and requesting comment on each. The Order on Remand, Report and Order, and Further Notice of Proposed Rulemaking was published in the Federal Register on November 12. The deadline for Initial Comments is November 26, 14 days after publication in the Federal Register.[1] The Public Utilities Commission of Ohio (Ohio Commission) hereby submits its comments on these matters.

Many of the resolutions to the various issues in these dockets comport well with the Ohio Commission's earlier comments filed in the respective dockets. The FCC has clearly attempted to craft proposals that bring together the best of the many ideas presented over the years in these dockets. In the opinion of the Ohio Commission, for the greatest part these attempts were successful. That is not to say that there are not issues and concerns with aspects of the proposals, or how those aspects have the potential to yield undesired outcomes.

One area in which the Ohio Commission has particular concern is that the result of many of the decisions proposed limit states' participation in "moving the ball forward." In some cases these are explicit decisions to do so, but in others they are a result of interactions between decisions that may not have been considered when the proposals were drafted. In developing the Telecommunications Act of 1996, Congress created a

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[1] *In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36 (Order On Remand and Report and Order and Further Notice Of Proposed Rulemaking at 1), 73 FR 66821-01 (hereinafter "FCC 08-262 Combined FNOPR").

Federal/State partnership, in which some responsibilities are split, and some are shared. In the areas where responsibilities are divided along jurisdictional lines, the states are often called upon to assist in the development and implementation of solutions to issues in the Federal area of responsibility. Preemption limits the states ability to assist in these matters, and their ability to adjust the details of implementation to the situation they find "on the ground" in their respective jurisdictions. Preemption, where it is not required (or not intended) actually frustrates the progress of Federal priorities, as compared to alternatives that leverage state jurisdiction and expertise to achieve what are, after all, common goals. Additionally, needless preemption will likely be challenged in the courts. Such a challenge will result in the further delay of much needed reforms. An alternative to preemption that has been suggested elsewhere, and has every indication that would work well for certain carriers, is a division of responsibilities in which the states take a light touch approach towards the carriers, and maintain responsibility for consumer protection as well as intercarrier issues under Section 251 of the Act.

With regard to the Universal Service reform proposals outline in the Appendices, the Ohio Commission is disappointed that the Joint Board Recommended Decision has been rejected. However, many of the ideas and concepts presented by the Joint Board remain in the three Appendices, and this is most clearly apparent in Appendix B. While there are issues, opportunities for improvement, and unanswered questions that arise under the "Narrow" proposal in Appendix B, it is an excellent foundation for the development of a long term solution to the longstanding issues surrounding the Universal Service fund.

In the area of Intercarrier Compensation reform, the Ohio Commission is of the opinion that the overall structure of the proposals outlined in Appendices A and C represent significant improvements over the current situation, and also over many of the proposals put forward in the respective dockets. The Ohio Commission feels that the single, uniform rate is a clear solution to minimizing, if not eliminating intercarrier arbitrage opportunities, and believes that the transition proposal will reduce the inevitable dislocations that result from any sweeping change to a market structure. The proposed treatment of intercarrier billing issues is consistent with rules already implemented in Ohio, and would be a great improvement if implemented nationwide, even if that were done independent of other Intercarrier Compensation reform. The Ohio Commission does have concerns with aspects of the proposed reform that appear to be needlessly, or in some instances possibly inadvertently, preemptive. The comments presented here point out the preemptive aspects, as well as other possible unintended (and undesirable) consequences of certain aspects of the proposed Intercarrier Compensation reform.

While the Ohio Commission applauds both the desire to take action on these issues and the willingness of the FCC to seek comment, the severely constrained timeframe for comment and the complexity and interrelated nature of the issues presented makes a complete treatment of the issues difficult. As a result, while the Ohio Commission has attempted to make reasonably comprehensive comments, it should be noted that a failure to comment on any aspect of the three proposals presented should not be taken as approval of or assent to the proposal, or that aspect.

DISCUSSION

I. Preemption and measures that have a preemptive effect

Among the areas of greatest concern to the Ohio Commission is the level and extent to which the proposals, particularly those in Appendices A and C, either directly (and needlessly) preempt the States, or contain mechanisms that have a preemptive effect by removing or constraining the States' control over areas of telecommunications that the Act specifically delegates to the States.

From the FCC's initial foray into the complexities of the 1996 Act, it was recognized that with respect to the jurisdictional reservation of Section 152(b):

> "We note that Sections 251 and 252 *do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions*. For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority."[2]

Thus, the FCC previously acknowledged that Congress' 70-year old jurisdictional reservation of State commission authority over intrastate communication services, found in 47 U.S.C. § 152(b), is applicable to matters not covered by Section 251.

Of greater significance is the United States Supreme Court's determination that the dual design of jurisdiction over telephone service found in the Communications Act of 1934 is retained in the face of the 1996 Act amendments. In *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Court found:

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[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. April 19, 1996), 11 FCC Rcd, 14,171 at ¶ 40 (emphasis added; footnote omitted).

> After the 1996 Act, § 152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from States' *exclusive* control. Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate *any aspect of intrastate communication not governed by the 1996 Act* on the theory that it had ancillary effect on matters within the Commission's primary jurisdiction.[3] Accordingly, it is settled that the FCC cannot preempt State authority concerning areas not granted exclusively to the FCC by the 1996 Act.[4]

Further, the Supreme Court has established a special requirement of showing clear Congressional intent where preemption touches an area traditionally regulated by the States. When Congress legislates in a field traditionally occupied by the States, the Court must assume that the historic police powers of the States were not superseded by the Federal Act, unless that was the clear and manifest purpose of congress.[5] As the Court determined in *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350 (1989), it is settled law that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."[6] This strong presumption against preemption of States' police power results in a narrow reading of even a specifically preemptive provision of law. This narrow analysis is particularly appropriate in view of the numerous savings clauses found in the 1996 Act that apply to intrastate

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3 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. April 19, 1996), 11 FCC Rcd, 14,171 at 381 (note 8) (emphasis added).

4 *AT&T*, 525 U.S. at 381 (note 8) (emphasis added).

5 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

6 *New Orleans Public Service, Inc.* at 491 U.S. 350, 365-366.

access charges. Those clauses are found in 47 U.S.C. §§ 251(d)(3), 253(b), 261(c) and 601(c)(1) (uncodified) (West 2008).

Other sections of the Act demonstrate Congress' ability to explicitly preempt intrastate authority. For example, § 332(c)(3) removes state "authority to regulate the entry of or the rates charged by any commercial mobile service."[7] Another example is Congress' express authorization of the FCC to regulate payphone line rates even though they would otherwise be considered an intrastate service.[8] The 1996 Act shows that Congress knows it is necessary to expressly override § 152(b) but it has not done so in the context of intrastate access charges.

The D.C. Circuit Court explained the high hurdle that must be overcome in denying state jurisdiction under § 152(b):

> While the apportionment of regulatory power in this dual system is, of course, subject to revision, whether the Commission may preempt state regulation of intrastate telephone service depends as in "any pre-emption analysis," on "whether congress intended the federal regulation supersede state law." The "best way" to answer that question, the Supreme Court has instructed, "is to examine the nature and scope of the authority granted by Congress to the agency." In cases involving the Communications Act, that inquiry is guided by the language of section 152(b), which the Supreme Court has interpreted as "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."[9]

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[7] 47 U.S.C. § 332(c)(3) (2008).

[8] *See,* 47 U.S.C. § 276 (2008).

[9] *New England Pub. Communication Council v. FCC,* 334 F.3d 69, 75 (D.C. Cir. 2003) (citations omitted).

Using this standard, the D.C. Circuit held that the statutory basis must be "so unambiguous or straightforward so as to override the command of § 152(b)."[10]

A. Internet Protocol/Public Switched telephone Network (IP/PSTN) services

The FCC's attempt to reform intercarrier compensation through its declaration that "authority to impose economic regulation with respect to IP/PSTN traffic rests exclusively with this Commission"[11] ignores the specific intent of Congress demonstrated in the definitions of "Telecommunications" and "Information Service" found in the Act.[12]

The manner in which the FCC has defined "without change in form or content" clearly violates congressional intent in that it effectively eliminates a distinction that Congress sought to establish, that between telecommunications (as the vehicle by which information is transmitted and delivered, "without change in form or content as sent and received")[13] and information services (as those services which provide "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*")[14]

In the name of establishing comprehensive intercarrier compensation rate reform, the FCC takes the unnecessary and unlawful step of declaring that all PSTN services

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10 *Illinois Pub. Telecomms. Ass'n*, 117 F.3d 555, 561 (D.C. Cir. 1997).

11 A-92, ¶ 208.

12 47 U.S.C. §§ 152(20), (43) (2008).

13 47 U.S.C. § 153(43) (2008), these are thus not "telecommunications" under the Act.

14 47 U.S.C. § 153(20) (2008), these are thus truly "information services" under the Act.

either originating or terminating over Internet Protocol (IP) are "information services."[15] As the discussion below indicates, the FCC alleges "such traffic today involves a net protocol conversion between end-users, and thus constitutes an "enhanced" or "information service."[16]

The FCC takes the position that anything *not* a telecommunications service is an information service. However, that is contrary to the language of the Act. The Act expressly defines an "Information Service" as: [T]he offering of a capability for *generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available* information *via telecommunications*, and includes electronic publishing, but *does not include* any use of such capability for the management, control or operations of a telecommunications system or the management of a telecommunications service."[17] At the same time, the Act defines "Telecommunications" as: [T]he transmission, between or among points specified by *the user*, of *information* of *the user's* choosing, without change in the *form or content* of the information *as sent and received*."[18]

The Ohio Commission submits that it can be discerned from these definitions that Congress intended the following: Information services *make use of telecommunications services* for their *transmission;* Information services involve the generation, manipulation, or storage of information *not* the transmission of information; conversely, telecom-

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15 FCC 08-262 Combined FNOPR, Appendix A at 209.

16 *Id*.

17 47 U.S.C. § 153 (20) (2008).

18 47 U.S.C. § 153 (43) (2008).

munications services are any services which involve the *transmission* of information, *not* the *generation, storage or manipulation* of that information; finally, whether there is a change in “form or content” is a matter of the form in which that information is *sent and received by the user(s)*, not what transpires between those two points. From the user’s perspective, embodied in the definition of telecommunications contained in the Act, when the information transmitted by voice is received by voice, there is no “change in form or content.”

The FCC recognized these points in its determination in FCC 04-97 that a service that undergoes a change in transmission protocol between its origination and destination is still a telecommunications service, because information remains in the same form when transmitted and received.[19] The FCC has stated no grounds for reversal of this determination. The determination made in FCC 04-97 is in accord with the plain meaning of the definitions of “Telecommunications” and “Information Services” in the Act.

Accordingly, in light of the Act’s definitions, “Telecommunications services” provides for the transmission of information by whatever protocols may make the provision of different services more efficient or less expensive. The use of IP-based transmission and routing protocols at any point of the transmission path does not in and of itself change the “form or content” of the information, any more than the use of Time Division Multiplexing (TDM) or fiber optics does in the PSTN. Similarly, the protocol conversion from TDM-to-IP, or vice versa (*i.e*. net protocol change), does not change the “form or

[19] FCC 04-97 (April 21, 2004) (AT&T Phone-to-Phone IP decision).

content" of the information, any more than the analog-to-digital conversion does in voice calls.

In addition, the FCC ignores the exceptions it established in its Non-Accounting Safeguards[20] regarding the treatment of services offering the use of two network technologies, namely when the protocol conversion is "to facilitate the interconnection of networks." This is exactly the purpose of the protocol conversion that occurs in offering IP/PSTN voice service, the facilitation of interconnection of the IP network with the circuit-switched network. This is also consistent with the definition of "Information Services" that "*does not include* any use of such capability for the management, control, or operations of a telecommunications system or the management of a telecommunications service." In other words, the net protocol conversion in an IP/PSTN voice service is for the "operation[] of a telecommunications system" and the management of a "telecommunications service," which are expressly excluded from the definition of "Information service." As a result of the plain meaning of the statute[21] and the criteria previously established by the FCC, IP/PSTN calls are exempted from the "Information Service" classification.

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[20] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905,¶ ___ (1996).

[21] As the Supreme Court has many times questioned and determined, "[b]ut what of the provision's literal language? The matter is important, for normally neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation. ***Under this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis." *Zuni Pub. Sch. Dist. V. Dep't of Educ.*, 550 U.S. 81, 127 S. Ct. 1534, 1543, *citing*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, (1984). The statutory definitions of "Telecommunications" and "Information Services" clearly manifest Congress' intent as discussed above.

However, there are true information services under the Act that are enabled by "voice over data" technologies, and enabled further by IP. These would be those services that allow a voice telephone call to be "changed in form or content as sent and received" (and more precisely, provide "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications")[22] such as text-to-speech or speech-to-text services, store-and-forward, and similar services. These services are made possible (on that level "enabled") by the conversion of voice to data, and data to voice, a transition that is already commonplace in the PSTN. These services are, in another sense, "enabled" by IP in that IP addressing makes the engineering economics efficient enough for the business model to be viable. It is these services, not the telecommunications networks that carry them, which the FCC can and should deem "information services."

B. Intercarrier Compensation Revenue Rebalancing

In revising the structure of intercarrier compensation, the FCC unavoidably creates shifts in costs and shifts in revenue recovery. However, the structure the FCC has proposed for handling these shifts has an unnecessary and avoidable preemptive effect. In order to allow carriers to recover reductions in interstate revenue, the FCC proposes to permit incumbent LECs to increase their interstate Subscriber Line Charge (SLC). Additionally if, after making increases to recover interstate revenue losses, there is remaining "headroom" below the interstate SLC cap, the incumbent LEC may use that to recover

[22] Therefore, not only "not telecommunications" but affirmatively "information services."

intrastate intercarrier compensation revenue reductions, if and only if the incumbent LEC's retail end-user rates and any intrastate SLC are set "at the maximum level permitted under state regulations."[23] Finally, the FCC mandates that any increase in interstate SLC revenues that are intended to recover lost intrastate intercarrier compensation revenues be used by the state in ratemaking to reduce costs or revenue requirements to be recovered in the intrastate jurisdiction.[24]

The Ohio Commission has several major concerns with the proposed access revenue recovery plan. While other issues are discussed below, of greatest import here is that it has a preemptive effect upon, or at least interferes with, the States' authority to set intrastate rates. In requiring that end-user rates and intrastate SLCs be set "at the maximum level," it potentially subjects the States' *intrastate* ratemaking processes to a legal challenge, based on a takings argument predicated on a carrier's inability to increase an *interstate* SLC. At best, what is "at the maximum level" is unclear. In addition, moving *intrastate* cost recovery via the *interstate* SLC tends to move revenues inappropriately to the interstate jurisdiction. Finally, even if section 251(g) empowers the FCC to subject traffic previously encompassed by section 251(g) to the reciprocal compensation regime of section 251(b)(5), including providing for an orderly transition as the FCC claims,[25] it does not provide it with the power to preempt the states' authority to establish the appropriate mechanism to recover intrastate revenue lost, as long as it is consistent with the

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[23] FCC 08-262 Combined FNOPR, Appendix A at 298-299, Appendix C at 293-294.

[24] FCC 08-262 Combined FNOPR, Appendix A at 298-299, Appendix C at 293-294.

[25] *See* FCC 08-262 Combined FNOPR, Appendix A at 300.

requirements of section 251, and does not substantially prevent the implementation of that section[26].

C. High-Cost Support tied to Information Services

An example of mechanisms that have a preemptive effect, without directly preempting, is the tying of the provision of high cost support for telecommunications service to the provision of an unregulated information service, as is done in Appendices A and C. It would be a different issue if the provision of High Cost support were tied to the provision of broadband transmission capability, which is still a telecommunications service under the Act. However, the requirement to provide Broadband *Internet Access* Service (BIAS), as a condition of continuing to receive (or gaining access to) High Cost funding, ties the provision of support for a local regulated telecommunication service to the provision of an unregulated information service. Such a tie is both unwise and unnecessary.

While the Ohio Commission agrees that there is a legitimate societal goal in expanding the concept of Universal Service to broadband connection to information services, there is no discernable reason (and no justification within either Appendix A or C) for tying a commitment to the provision of internet access service to the availability of basic universal service support.

The effect of tying the receipt of High Cost Universal Service Funding to the provision of BIAS, an "information service," is to supersede Congress' delegation of

[26] Section 251(d)(3) of the Act.

authority to the states in the absence of a "statutory basis [that] must be "so unambiguous or straightforward so as to override the command of § 152(b)."[27]

By declaring that the receipt of high cost universal service funding must be accompanied by the provision of BIAS, the FCC effectively wrests jurisdiction from the states. This is accomplished when a carrier fails to make BIAS available within the 5 year period. A carrier currently receiving USF-HC, which fails to provide BIAS, under the proposal, will receive no USF-HC, not even for plain old telephone service (POTS). Through the proposal the USF-HC would then be awarded to another carrier, who in turn is required to make available both telecommunications and BIAS services as a carrier of last resort, to any and all unserved customers. Effectively, this gives the FCC the authority to create a functional incumbent local exchange company in the absence of State action or authority over this company. As is discussed elsewhere, this creates issues in both the interstate and intrastate jurisdiction.

While "[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation," the FCC cannot arbitrarily and capriciously ignore the dual jurisdictional nature at stake here.[28] The D.C. Circuit Court explained the high hurdle that must be overcome in denying state jurisdiction under § 152(b) and that "is to examine the nature and scope of the authority granted by Congress to the agency [and in the case of the FCC], "that inquiry is guided by the language of section 152(b), which … [is] interpreted as "not only a substantive jurisdic-

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27 *Illinois Pub. Telecomms. Ass'n*, 117 F.3d 555, 561 (D.C. Cir. 1997).

28 *Minnesota Pub. Util. Comm. v. FCC*, 483 F.3d 570, 581 (2007).

tional limitation on the FCC's power, but also a rule of statutory construction."[29] Using this standard, the D.C. Circuit held that the statutory basis must be "so unambiguous or straightforward so as to override the command of § 152(b)."[30]

In addition, it may well go beyond the bounds of Congressional intent in establishing universal service, for although Congress did indicate in § 254(b)(2) that "Access to advanced telecommunications and information services should be provided in all regions of the Nation" as a principle of universal service, it also *defined* universal service as "…an evolving level of *telecommunications services* that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services"[31] [emphasis added] and states in §254(b)(2) that "… the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which *such telecommunications services* – (A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity." [Emphasis added]. These definitions make it clear that, though the needs

29 *New England Pub. Communication Council v. FCC,* 334 F.3d 69, 75 (D.C. Cir. 2003) (citations omitted).

30 *Illinois Pub. Telecomms. Ass'n,* 117 F.3d 555, 561 (D.C. Cir. 1997).

31 47 U.S.C. § 254(c)(1) (2008).

of information services, as defined under the Act,[32] are to be taken into account in the development of plans to further universal service; they are not to be a part of universal service support. Where, such as is the case here, the language is clear "[u]nder this Court's [Supreme Court] precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis." *Zuni Pub. Sch. Dist. V. Dep't of Educ.*, 550 U.S. 81, 127 S. Ct. 1534, 1543, *citing, Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778 (1984). The statutory definition of "universal service" unambiguously provides that, though the needs of information services are to be considered in the development of plans to further universal service, they are not to be included in universal service support.

D. ICC Reform - Modifications and Suspensions under Section 251(f)(2)

In the discussion of Modifications and Suspensions under Section 251(f)(2) as part of ICC Reform in Appendices A and C, the FCC states that it finds it appropriate due to the importance of bringing uniformity and symmetry to intercarrier compensation to adopt guidelines regarding the application of Section 251(f)(2) of the Act. As the FCC correctly notes, Section 251(f)(2) of the Act permits a local exchange carrier with less than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide to petition a State Commission for the suspension or modification of an application or

[32] The definitions of information and telecommunication services as they are used here are discussed earlier in the text discussing IP/PSTN

requirement of Sections 251(b) or (c) under certain conditions.[33] While the need for consistency is understood, the "guidelines" proposed severely constrain the States in doing the work that the Act properly delegates to them.

The Ohio Commission points out that Sections 251 (b) and (c) of the Act encompass the duties of local exchange carriers and the additional duties or requirements of incumbent local exchange carriers. These two sections set forth a wide-ranging set of obligations from dialing parity and number portability to interconnection and the duty to provide unbundled network elements. However, because of the FCC's concern with creating an overarching proposal mandating a unified intercarrier compensation system, the Ohio Commission believes that the FCC has, in this section, extended its reach to matters that are best left to the state jurisdiction.

The FCC is proposing that pursuant to the Supreme Court grant of authority to interpret section 251(f) and due to the FCC's Section 201 authority to carry out its duties in interpreting the Act, it adopt rules specifically addressing certain implications of a suspension or modification of the FCC's intercarrier compensation rules.[34] The FCC then proceeds to direct the states as to the appropriate duration of any suspension or modification granted pursuant to section 251(f)(2) and the appropriate substantive standards that the State Commissions should use "when evaluating requests pursuant to section 251(f)(2) for the suspension or modification of 251(b) or (c)."[35] The FCC even goes so

[33] FCC 08-262 Combined FNOPR, Appendix A at 282, Appendix B at 277.

[34] FCC 08-262 Combined FNOPR, Appendix A at 288, Appendix B at 283.

[35] FCC 08-262 Combined FNOPR, Appendix A at 284-287, Appendix B at 279-282.

far as to direct any State Commission that grants any suspension or modification of more than 1 year in duration, to take a fresh look to determine whether such suspension or modification continues to satisfy the statutory test in light of possible changes in circumstances at least 90-days prior to the expiration of the 1-year deadline.[36] While the FCC seems the most concerned that states may grant a suspension or modification of the reciprocal compensation requirements found in 251(b)(5) for a period of time that might interfere with the implementation of state-wide uniform intercarrier rates, it clearly provides direction to the states with regard to any applications that a state may receive for suspension or modification under 251(f)(2).[37]

Since the inception of the Act, the Ohio Commission has received several applications seeking exemption under 251(f)(1) and or suspension or modification of a requirement under 251(f)(2). All such applications have been received because of a small Ohio incumbent local exchange carrier's (ILEC's) receipt of a bona fide request (BFR) for interconnection or local number portability. Based on the circumstances of each request, the Ohio Commission has either denied the request, or granted, for a limited period of time, the requested relief under 251(f)(1) or (2). In evaluating each request, the Ohio Commission routinely applies the criteria set forth in the Act. Our evaluation is similar to the one proposed by the FCC when it provides guidance to the states regarding how to evaluate the standards set forth in 251(f)(2). It must be pointed out, however, that each

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[36] FCC 08-262 Combined FNOPR, Appendix A at 290, Appendix B at 285.

[37] *See*, for example, FCC 08-262 Combined FNOPR, Appendix A at 284 and Appendix B at 279: "We also offer guidance regarding the substantive standards that state commissions must apply when evaluating requests pursuant to Section 251(f)(2) for a suspension or modification of section 251(b) or (c)."

request is unique based on the details of the BFR, the size, financial status and competitive position of each small ILEC, among other issues. The Ohio Commission does not agree with the FCC's "one-size fits all" approach to evaluating 251(f)(2) requests especially when the FCC's focus appears to be only those applications where a small ILEC seeks an exemption of the reciprocal compensation requirement found in 251(b)(5).

While the Ohio Commission appreciates the FCC's concern that a suspension or modification of the reciprocal compensation requirements in 251(b)(5), pursuant to 251(f)(2), might undermine the movement to uniform reciprocal compensation rates, the Ohio Commission reminds the FCC that it has also entrusted the State Commissions through this very same proposal with implementation of its plan including setting reciprocal compensation rates using the FCC's incremental pricing methodology.[38] Indeed, if the State Commissions can be relied upon to implement the FCC's plan, a state should also be trusted to judge a 251(f)(2) application and its effect, including timing, upon the new intercarrier compensation framework where those applications, if any, request a suspension or modification of 251(b)(5).

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[38] FCC 08-262 Combined FNOPR, Appendix A at 269, Appendix B at 264.

II. Universal Service Reform

A. High Cost Fund Structure and Requirements

On May 1, 2007, the Joint Board on Universal Service released a Recommended Decision[39] on reforming Universal Service. It is, in the opinion of the Ohio Commission, it is extremely unfortunate that the FCC[40] has chosen to reject that recommendation in favor of proposals that are, frankly, not as good at meeting the goals of Universal Service without creating opportunities for regulatory arbitrage. To be certain, there are aspects of the Recommended Decision that are included in the proposals represented in the three Appendices, however, it is the differences that create the issues.

In its earlier comments regarding the reform of the Universal Service Fund, the Ohio Commission has advocated for the following characteristics in any adopted reform:

- A separation between the different goals that the high cost fund had been asked to meet.
- Ending the "identical support" rule.
- A need for equity in terms of the obligation to serve, and a balance between cost support, responsibility and accountability.
- Ongoing State authority over the Eligible Telecommunications Carrier (ETC) designation, including the Reverse Auction process.

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39 *High-Cost Universal Service Support; Federal-State joint Board on Universal Service,* WC Docket No. 05-337, CC Docket No. 96-45, Recommended Decision, 22 FCC Rcd 20477 (JB 2007) (hereinafter "Comprehensive Reform Recommended Decision").

40 Including Chairman Kevin Martin, who was a signatory to the Joint Board Recommended Decision.

- Capping the High Cost fund during any transition period.
- Continued use of costing methods for the provider of last resort (POLR) fund, with Reverse Auctions used for the Mobility and Broadband funds.

While the proposals in Appendices A and C do contain measures that achieve some of these points, the importance of the first appears to have been totally lost, possibly in a desire to achieve other ends. As the Ohio Commission noted in its July 2, 2007 comments in Docket 96-45:

> It is worth considering that using a single mechanism to deal with multiple societal goals often leads to conflict between those goals. For any societal goal, there may come a time when that goal no longer needs artificial support, or needs to be supported differently. The mechanism that supports a societal goal should stand alone, so that when the time comes that it is no longer needed, or is in need of adjustment, the support can be altered or discontinued without disturbing the support of other societal goals.[41]

Because of these concerns, the Ohio Commission advocated the segregation of Universal Service Funds to support the different societal goals of ubiquitous voice telephone service, ubiquitous broadband availability, and competition. It has already been seen how combining the societal goals of ubiquitous fixed voice telephone service, ubiquitous mobile telecommunications service, and promoting competition, exemplified in the inclusion of competitive ETCs (CETCs) in the High Cost Fund and the identical support rule, led to a series of unforeseen consequences.[42] The Commission was wise in

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41 *In the Matter of the Notice of Proposed Rulemaking Regarding an Interim Cap on High-Cost Universal Service Support for Competitive Eligible Telecommunications Carriers*, WC Docket No. 05-337, CC Docket No. 96-45 (Reply Comments of the Public Utilities Commission of Ohio at 3) (July 2, 2007) (hereinafter "Ohio 05-337 Reply Comments").

42 Ohio 05-337 Reply Comments at 2-3.

ending the identical support rule and constraining CETC access to the fund as represented in the various proposals, but the different societal goals are still intermingled, and still leave opportunities for the unforeseen.

Once again, the Ohio Commission renews its advocacy for the implementation of a separate USF mechanism to achieve each of these societal goals. Each mechanism can then be tailored to meet the societal goal, and each can be adjusted as those goals are achieved, as was proposed in the Joint Board Recommended Decision.

As noted, there is some question as to the extent of congressional intent with regard to extending Universal Service support to an information service. A quite practical, reason therefore for not tying support for basic telecommunications service to the provision of BIAS is that the act of tying these services is only questionably under the FCC's authority. It is safe to say that in a reform of this type, if it can be questioned, it will be taken to the Courts by some party. The result would likely be to tie up much needed basic Universal Service Reform in the courts for an extended period of time. If Universal Service Reform is "siloed," as was recommended by the Joint Board, any challenges would similarly be "siloed" allowing those reforms not challenged to proceed forward.

Given these stated concerns, the Ohio Commission views the proposal in Appendix B, the "Narrow Universal Service Reform Proposal," as a vastly better proposal than the Universal Service proposals in either Appendix A or C. It appears to be very close to the POLR Fund proposal from the Joint Board Recommended Decision. If that is indeed the intention, the Ohio Commission feels that the "Narrow" proposal should be adopted as an initial step in the development of the Joint Board's recommended decision.

That being said, there are some questions regarding aspects and effects of the "Narrow" proposal that need to be resolved prior to implementing the proposal. In Paragraph 27, in the discussion of the transition between the existing incumbent ETC and the winning bidder, there is the conclusion that: As the winning ETC builds out to those geographic areas[43] and certifies that it complies with all its obligations under this order for that area, it will receive high-cost support for that portion of the study area, and the incumbent LEC will no longer receive such support for that area.[44]

At the point where the winning bidder actually wins the reverse auction, the incumbent LEC is already providing service to a given percentage of the population, and receives the existing Universal Service High Cost support consistent with the population served, since the support is provided on a per line served basis. Clearly the winning bidder should receive the support that they bid for to the extent that they actually build into the "difficult to serve areas." That much is understandable, but it is unclear how the existing support to the incumbent (who is providing service to those already served) tapers off or transitions, since the winning bidder is presumably building out to serve those not already served, rather than those already being served. A clearer transition path may be to provide USF support to the winning bidder to the extent that they are providing service to customers in the service area, rather than simply having built out facilities. As

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[43] In Appendix B, "[T]hose areas" is identified in Paragraph 26 as "difficult to serve areas."

[44] FCC 08-262 Combined FNOPR, Appendix B at 27.

new customers are added (either from the existing pool of customers or from previously unserved customers), the existing total USF could be allocated based on the percentage of total customers in the service area served by each carrier.

It is also unclear how the winning bidder would be treated for the purpose of Section 251 of the Act. They would not be the incumbent carrier, as the Act defines incumbent, but by taking on the POLR responsibility for the entire service area, they would take on many of the same functions and would, at least in the areas they build out to, be the holder of bottleneck facilities. Is the existing incumbent still the incumbent for the purpose of Section 251? Is the winning bidder declared a "new incumbent" pursuant to §251(h)(2) of the Act? Does this leave two competing incumbent providers in place, or does the "incumbent incumbent" cease to be the incumbent provider, supplanted by the "new incumbent"? These questions would need to be resolved before implementation of a proposal to reverse auction not only high cost support, but also the POLR obligation, could be undertaken. This may explain why the Joint Board Recommended Decision *did not* implement reverse auctions for the POLR fund (which would be available to ILECs or other sole providers of service), but *only* for the Broadband and Mobile funds.

Additionally, it can place the existing incumbent carrier who does not make a broadband commitment in a "Catch-22" scenario in Ohio, as it probably would in many other states. To put it simply, under Ohio law, the existing incumbent provider would still be required to provide service, to anyone requesting it, throughout their existing service territory, absent approval to abandon services or facilities. An incumbent provider of local telephone service who wished to remain in the telecommunications business would still be the POLR in the intrastate jurisdiction, but not the interstate. Such an outcome, with multiple providers, each having the POLR obligation in a high cost area, is clearly contrary to the intended result of the FCC's proposals.

B. High Cost Fund Caps

Another recommendation made by the Federal-State Joint Board was to cap the high-cost fund at the $4.5 billion which was the approximate level of the 2007 high-cost support.[45] The Ohio Commission filed comments agreeing with this Joint Board recommendation.[46]

Although the FCC agreed with the Joint Board recommendation to cap the fund, different capping levels, timeframes, and mechanisms are proposed. In Appendix A the FCC proposes to cap the overall high-cost fund at the total amount for the December 2008 annualized basis rather than the recommended 2007 high-cost level recommended by the Joint Board.[47] Additionally, the FCC proposes to freeze support at the December 2008 annualized basis for each incumbent ETC's individual high-cost support on a lump sum basis as opposed to a per-line basis.[48] Appendix B establishes a cap on the overall high-cost fund at the 2007 level recommended by the Joint Board. While there may be administrative efficiencies in capping the fund at 2007 levels, as there is an existing cap

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[45] Comprehensive Reform Recommended Decision at 26.

[46] *Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96- 45 (Comments of the Public Utilities Commission of Ohio Regarding High-Cost Universal Service Reform at 12) (May 18, 2008) (hereinafter "Ohio 2008 Comprehensive Reform Comments").

[47] FCC 08-262 Combined FNOPR, Appendix A at 16.

[48] *Id*.

in place based on that timeframe, the Ohio Commission has no specific recommendation as to which timeframe or capping structure is more appropriate.

Appendix C makes a distinction between carriers that are under price caps in the interstate jurisdiction and those that are rate-of-return at the interstate jurisdiction. Under this proposal, rate-of-return ILECs will continue to operate with no change to their high-cost support through the year 2010. Therefore all the high-cost loop support, local switching support and safety net additive support will continue as it is (on a per-line basis) until the year 2010 when it will be frozen at the study area level for that year. In the interstate jurisdiction, the majority of Ohio's ILECs receiving high-cost support would be considered rate-of-return carriers. For these carriers, extension of their existing funding mechanisms to allow the opportunity for consideration of business models and rate rebalancing is entirely appropriate.

C. CETC Funding

The proposals in Appendices A, B and C take different approaches to handling CETC access to High Cost funding. Appendix A indicates that CETCs will be funded based on costs, Appendix B includes CETCs in the pool of potential bidders in the reverse auction for high-cost support with ILECs, while Appendix C removes existing CETC support over 5 years, and asks in the context of a Further Notice of Proposed Rulemaking how High Cost support would be provided to wireless carriers in the future.

Under Appendix A, CETCs (who are predominately wireless carriers), would automatically continue to receive High Cost support, based on their costs, capped at the

December 2008 level, and subject to the Broadband build-out requirement. Incumbent wireline carriers have the potential to maintain continued capped support, but would be faced with a reverse auction process if they were unable or unwilling to commit to the Broadband build-out requirement. A wireless CETC could presumably bid into that reverse auction. For that reason, it appears that a wireless CETC gets at least two bites at the High Cost Fund apple, in a situation where the incumbent wireline carriers would be unable to even obtain their existing support.

As has been demonstrated previously, the actual penetration rate of unsupported wireless carriers exceeds that of supported wireless carriers. In comments filed in April of this year,[49] the Ohio Commission noted:

> The two studies released by Criterion Economics in June of 2007 make this abundantly clear. The first of these studies, by Nicholas Vantzelfde (Vantzelfde Study) states: "In total, there are 143.8 million people who are covered by one or more unsubsidized carriers in the 814 study areas where other wireless CETCs are receiving funds. Unsubsidized carriers cover 97.3% of the population, while subsidized carriers cover less than 70% of the population in these study areas."[50] [Emphasis added]. In other words, the wireless unsubsidized carriers provide more coverage than those wireless carriers who receive the subsidy. Additionally, according to the study, the wireless unsubsidized carriers provide service to more customers in the rural areas than do the wireless subsidized carriers.[51]

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49 Ohio 2008 Comprehensive Reform Comments at 4.

50 *The Availability of Unsubsidized Wireless and Wireline Competition in Areas Receiving Universal Service Funds*, Criterion Economics, L.L.C. at 10 available at: criterioneconomics.com/docs/Criterion%20CETC%20Service%20Availability%20Paper%20Final.pdf.

51 *The Availability of Unsubsidized Wireless and Wireline Competition in Areas Receiving Universal Service Funds, Criterion Economics, L.L.C.* at 15 available at: criterioneconomics.com/docs/Criterion%20CETC%20Service%20Availability%20Paper%20Final.pdf.

If the *unsubsidized* wireless carriers are doing better at providing universal service than the *subsidized* carriers, the benefit of continued high cost support to wireless carriers, even on a cost basis as is proposed in Appendix A is open to question. Again, this points up the need for segregated high cost funds for POLR, Mobility and Broadband services as was proposed by the Joint Board.

Given the current structure of the three proposals, the Ohio Commission is of the opinion that the plan outlined in Appendix B most closely aligns with the Joint Board's Recommended Decision, and is therefore the preferable proposal.

D. Reverse Auctions

Again, the Ohio Commission believes that the ultimate solution to providing high cost support in an equitable and efficient manner lies in establishing separate USF funding mechanisms for POLR, Mobile services, and Broadband services, rather than trying yet another "one size fits all" solution. The Ohio Commission observes that the experience with the identical support rule demonstrates that one size never really fits all. It rarely fits more than one, and sometimes it does that badly.

That being said, the Ohio Commission does see a glimmer of hope in aspects of the proposals for USF High Cost Reform. As discussed previously, the proposal in Appendix B goes a long way towards reducing the problems associated with Appendices A and C. The reverse auction process outlined in the appendices, seen as a stand-alone selection process, independent of the issues of how it is applied in Appendices A, B, and C, is promising.

The following aspects of the Reverse Auction process as outlined in the three Appendices comport well with an ideal process as outlined in the Ohio Commission's earlier comments:

- The use of a "single winner" per auction.
- Auctioning for the entire study area, rather than disaggregating.
- The use of a reserve price of the existing High Cost funding of the Incumbent ETC.
- The requirement to make a commitment to provide service to all who request it (through attaching the POLR commitment with regard to unserved or underserved customers to the receipt of High Cost funding).
- A build-out timeframe commitment is important for accountability, particularly for broadband and mobility services.

Each of these aspects is discussed in more detail below, as well as areas with which the Ohio Commission has concerns.

With regard to the "single winner" concept, as FCC Chairman Kevin Martin himself has noted, and as the Ohio Commission recognizes "it makes little sense to provide support for multiple providers of a single service in markets that are 'prohibitively expensive for even one carrier.' "[52] While there is good reason to provide support to multiple providers of *different* services (POTS, Wireless and Broadband services), or provide sup-

[52] *In the Matter of High Cost Universal Service Support, In the Matter of Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (Comments of the Public Utilities Commission of Ohio Regarding Reverse Auctions at 4-5) (April 18, 2008) (hereinafter "Ohio 2008 Reverse Auction Comments") quoting FCC Chairman Martin's reply to Representative Edward J. Markey's April 2, 2007 letter regarding Universal Service Issues. Both Representative Markey's letter and Chairman Martin's reply are available at: http://markey.house.gov/index.php?option=com_content&task=view&id=2825&Itemid=46.

port to a single provider of multiple services through multiple mechanisms, the provision of support to multiple providers of a single service, under circumstances where one provider cannot provide service at reasonable rates, is simply a waste of effort.

The Ohio Commission generally agrees that the initial basis for conducting the reverse auction should be the entire study area. As the FCC specifically noted the Ohio Commission's comments regarding this issue in Footnote 110 of Appendix A, Footnote 71 of Appendix B, and Footnote 112 of Appendix C, we will not repeat those comments here. However, it should be noted that the Ohio Commission's comments indicated that, for larger ILECs, where a single study area encompasses large areas that can be extremely diverse in operating conditions, the States should be "given the authority to make such reasonable subdivisions as appear necessary"[53]

With regard to the establishment of a reserve price, the Ohio Commission generally agrees with the use of the existing incumbent carrier's cost support as a reserve price for a high cost fund supporting telecommunications service (that is, divorced from the broadband commitment). As noted by the FCC, to do otherwise would provide support to a carrier who was demonstrably less efficient than the incumbent.

In regard to a POLR commitment, the Ohio Commission has previously stated: "DialToneServcies[sic] quite reasonably maintains that all ETCs participating in a reverse auction "…should be required to comply with real and meaningful "provider of

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[53] Ohio 2008 Reverse Auction Comments at 7.

last resort" obligations. As part of this obligation, all ETCs must be required to provide service to all requesting customers within the bid area at standard installation rates."[54]

As has been discussed elsewhere in these comments, the application of the POLR concept, in a reverse auction scenario, in which an existing incumbent is already providing service and has a POLR (or POLR-like) obligation, and that obligation may be laid on another carrier in the same service territory creates a number of jurisdictional, legal, and practical conflicts. It may result in two carriers having the POLR responsibility in a single study area.

E. Build-out timeframe and Accountability

The Ohio Commission has previously noted that, with respect to build out timeframes and accountability, for a new carrier just coming under the POLR requirement, some time period for transition and build-out is appropriate.[55]

F. Other Areas of Concern

The Ohio Commission is troubled by the requirement that an entity achieve ETC designation prior to participation in an auction, and has expressed these concerns previously.[56] For example: The Ohio Commission believes that auctions should be structured so as to permit any competitor in the market to bid, in order to determine who can best serve an area. This is especially true in light of the additional requirements that the

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54 Ohio July, 2007 Reply Comments at 8.

55 Ohio July, 2007 Reply Comments at 8.

56 Ohio 2008 Reverse Auction Comments at 5-6.

Commission has suggested to apply to auction participants. If a bidder cannot meet these requirements, it holds that they would not be able to support any area that they would win.

By opening the bidding process to providers who do not have a current ETC designation, and allowing the states to both administer the reverse auction and certify ETC status, the chance of a successful auction is maximized. By maximizing the pool of potential bidders for a given area, the risk of an insufficient number of bidders, or of significant gamesmanship among the bidders is decreased.

Given the requirements for gaining ETC designation, a requirement for that designation prior to bidding may needlessly limit the number of bidders for a Service Area, by placing a large and expensive hurdle to overcome, with no guarantee that the investment in gaining ETC status would ever result in gaining the support. Conversely, entering into the bidding process without ETC status may result in support being awarded to an unqualified entity. This creates a bit of a "chicken and egg" problem.

The Ohio Commission believes that the solution to the problem is in the reverse auction process itself. The winning bidder could be identified on a provisional basis, pending the receipt of ETC status. If the winning bidder failed to gain ETC status, then the next-best bid would be the "provisional winner." While there may be some concern about whether ETC status could be gained on a sufficiently timely basis, the reverse auction process itself creates a certain degree of incentive both for the States to proceed in an expeditious manner, and for the parties requesting ETC status to cooperate fully in making expeditious decision-making possible (providing information in a timely manner).

Another option, and one that may have the great advantage of simplicity, is to combine the reverse auction and ETC designation processes. As the Ohio Commission has noted earlier[57] the reverse auction process is already very similar to an RFP process, with which the States are already very familiar. Combining the ETC designation process with the reverse auction process would increase efficiency, and would provide a "one stop shop" for carriers wishing to bid for high cost support. The additional cost of bidding in such a scenario may have a slight effect of suppressing the number of bidders, but it may only act to eliminate bidders who would not likely qualify as an ETC in any case.

G. Expansion of Lifeline and Linkup programs to Broadband

Installation costs and monthly charges can limit low-income households' adoption of broadband internet services, just as they have kept phone subscription out-of-reach for these same households. Section 254 (b)(3) of the Act states that "low-income consumers… should have access to… advanced telecommunications and information services, that are reasonably comparable to those service provided in urban areas and that are available at rates charged for similar services in urban areas." The Lifeline/Linkup pilot program for broadband internet services presented in Appendices A and C[58] offers some

57 Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96- 45, FCC 08-22 (Reply Comments of the Public Utilities Commission of Ohio Regarding High-Cost Universal Service Reform, Identical Support And Reverse Auctions at 8) (May 27, 2008).

58 FCC 08-262 Combined FNOPR, Appendix A at 64-91, Appendix C at 60-87.

solutions to overcoming these barriers, solutions which are consistent with the Act and comport well with the larger universal service goals stated in the Act.[59]

While there may be concerns about various aspects of the program, the Ohio Commission is of the opinion that, as the proposal is a pilot program, intended to explore what is effective and efficient, any criticism should be reserved until there is an opportunity to understand and comment on the results of the pilot.

H. Reform of Universal Service Contributions

In all three proposals, the FCC determines that the current system of contributions to the interstate USF, based on a percentage of a company's interstate and international end user revenue, is "broken."[60] The FCC points out that it has repeatedly patched the framework to accommodate decreasing interstate revenues, packages that include unlimited long distance, and changes in technology. While noting that these new packages and services have brought enormous consumer benefits, they have also strained the current contributions system.[61]

Therefore, the FCC finds that it is appropriate to adopt a new system of contributions that will assess a $1.00 contribution per assessable residential telephone number per month in Appendices A and C; and, in the alternative, .85 cents per residential telephone

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59 It is interesting and perhaps informative to note that this pilot program is a separate program from the existing Lifeline / Linkup programs. This is another indication that the interest overall in universal broadband service does not need to be met by tying the provision of telecommunications support to the provision of an information service.

60 FCC 08-262 Combined FNOPR, Appendix A at 97, Appendix B at 44, Appendix C at 93.

61 FCC 08-262 Combined FNOPR, Appendix A at 97, Appendix B at 44, Appendix C at 93.

number in Appendix B.[62] This fee, according to the FCC, if the carrier so chooses, may be passed-through to residential customers in the form of end-user universal service fees that may not exceed a carrier's contribution cost.[63] Furthermore, the FCC also concludes in Appendices A and C that providers of business services should contribute to the interstate USF on a connection, rather than a number basis, and seeks comment on the implementation of that methodology,[64] retaining a revenue-based contribution methodology while a connections-based methodology is developed.[65] Appendix B proposes a connections-based contributions methodology for business customers, without seeking additional comment.

To a great extent, the Ohio Commission agrees with the FCC that the current contribution system is broken and a move to a telephone number methodology for residential services, and, eventually, a connection based methodology for business services, is a move in the right direction. As the Ohio Commission stated in its previous comments concerning this matter, USF support should be paid by all carriers who use the PSTN to terminate traffic.[66] The proposals require those that obtain telephone numbers or other connections to the PSTN to also contribute to the USF. We agree with the FCC that this proposal appears to provide a relatively simple, specific, predictable and suffi-

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62 FCC 08-262 Combined FNOPR, Appendix A at 97, Appendix B at 44, Appendix C at 93.

63 FCC 08-262 Combined FNOPR, Appendix A at 107, Appendix B at 54 and Appendix C at 103.

64 FCC 08-262 Combined FNOPR, Appendix A at 343 and Appendix C at 340.

65 FCC 08-262 Combined FNOPR, Appendix A at 133, Appendix C at 129.

66 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Reply Comments of the Public Utilities Commission of Ohio at 14) (February 2, 2007).

cient funding source. The Ohio Commission also concurs with the FCC that its proposal is technologically and competitively neutral. Thus, it will eliminate incentives under the existing framework to migrate to service and technologies that are currently exempt from the contribution mechanism. Finally, the Ohio Commission also shares the FCC's opinion that telephone numbers provide an easily identifiable basis for contribution for residential services and will promote number conservation. We agree that if contributors are assessed based on the residential telephone numbers assigned to them, they will have an incentive to efficiently manage their numbering resources in a way that minimizes their cost; directly resulting in the need for fewer area code exhaust proceedings.

In order to capitalize further on the FCC's residential number-based contribution methodology, the Ohio Commission recommends that the FCC carefully consider any carrier exclusions that it has incorporated into its proposal. For example, the FCC deems[67] that it will exclude from its definition of Assessable Numbers,[68] those numbers that are used merely for routing purposes in a network and are provided at no charge to the customer in order to route or forward calls to a residential number, office number and/or mobile number. The Ohio Commission understands that these services are typically referred to as "follow-me" services and were the subject of an *Ex Parte* Presenta-

[67] FCC 08-262 Combined FNOPR, Appendix A at 123, Appendix B at 71, Appendix C at 119.

[68] The FCC defines Assessable Numbers as a North America Numbering Plan (NANP) telephone number or functional equivalent identifier in a public or private network that is in use by a residential end user and that enables the residential end user to receive communications from or terminate communications to (1) an interstate public telecommunications network or (2) a network that traverses (in any manner) an interstate public telecommunications network.

tion made to the FCC Chairman's office on October 2, 2008 by representatives of Google, Inc. According to the *Ex Parte* letter filed October 3, 2008 in FCC WC Docket 06-122 and FCC CC Docket 96-45, Google uses its "GrandCentral platform" in order for it to provide free telephone numbers and community voice mail to its residential customers on a web-based IP platform. Such telephone numbers allow calls to be routed to an existing customer telephone number or to be terminated into a Google-provided community voice mailbox.[69]

The Ohio Commission is concerned about the exclusion of "follow-me" services from a numbers-based contribution methodology since such services have the potential of utilizing a very significant amount of numbering resources to the exclusion of the benefits of both the proposed contribution methodology and the promotion of number conservation. In fact, the FCC discusses at length how customers of certain "one-way" services benefit by accessing the network to receive calls and therefore should not be exempt from the numbers-based contribution methodology.[70] The FCC specifically states that one-way service providers, which include but are not limited to one-way paging, electronic facsimile, and voice mail services (except for free, stand-alone voice mail for people without telephones) have not shown "that a grant of exemption is warranted."[71] Neither does the FCC, in these same paragraphs, exempt one-way services that

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69 *See* http://www.grandcentral.com (last visited November 19, 2008) for complete description of services.

70 FCC 08-262 Combined FNOPR, Appendix A, at 113 and 143, Appendix B at 60 and 91, Appendix C at 109 and 138.

71 FCC 08-262 Combined FNOPR, Appendix A at 144, Appendix B at 61, Appendix C at 139.

are offered on a free or nearly free basis. The FCC states that the providers of "free" services generate revenue through advertising or other means and therefore the "services that benefit from a ubiquitous public network are fairly charged with supporting that network." The Ohio Commission fails to see how the "follow-me" service proposed by Google or other providers differs from the rationale that was utilized by the FCC to not exempt these other services from the numbers-based contribution methodology. Bottom line, the Ohio Commission believes that the *only* appropriate exemption for the residential numbers-based contribution methodology is for Lifeline customers and we believe the FCC finding exempting services to Lifeline customers from the new contribution methodology is reasonable.

Next, the Ohio Commission notes that, without explanation, the FCC adopts a residential contribution fee of $1.00 per number per month in Appendices A and C, but $.85 per number per month in Appendix B. For all of the aforementioned reasons, set forth in other areas of these comments, that the Ohio Commission prefers the Narrow Universal Service proposals found in Appendix B, we recommend that the FCC adopt a contribution amount of $.85 as an entire package of universal service reform. Furthermore, $.85 appears to be more in line with the current average universal service fee paid by Ohio consumers. In support of a $1.00 contribution fee per residential line, the FCC notes that IDT Telecom indicated that the average residential household paid $1.37 in universal service fees in *2006*.[72] While the Ohio Commission lacks empirical data to

[72] FCC 08-262 Combined FNOPR, Appendix A Footnote 279, Appendix C Footnote 271.

support its belief that the average USF fees, in Ohio, are closer to $.85 than $1.00; we also find no support for basing a USF contribution rate in today's economy upon the data supplied by one entity for 2006, since the current USF contribution fee is based on a percentage of the contributing company's declining interstate revenues. Furthermore, the FCC utilizes the same footnote text to support its finding of $.85 in Appendix B.[73] Therefore, lacking specific data from the FCC to quantify the actual universal service fee paid by consumers, the Ohio Commission recommends, again, that the FCC adopt the Universal Service reform proposals found in Exhibit B including the $.85 contribution amount for residential services.

Finally, the Ohio Commission believes it is important to express our concern and concurrence with the FCC's statements that Assessable Numbers should not be limited to those services that exclusively use the PSTN. As the FCC recognizes, the definition must encompass public or private interstate networks regardless of the technology or the transmission medium of the network.[74] Furthermore, we are concerned, as is the FCC, with those carriers that may because of technology or other means, bypass the use of NANPA-issued numbers, and, therefore, avoid their contribution obligations. The FCC requires that any alternative methods that are the functional equivalent of Assessable Numbers should be counted towards a company's obligation to the universal service

[73] FCC 08-262 Combined FNOPR, Appendix B at 152.

[74] FCC 08-262 Combined FNOPR, Appendix A at 126, Appendix B at 74, Appendix C at 122.

fund.[75] The Ohio Commission supports this proposal by the FCC and believes it will be especially important to avoid future problems that currently plague the universal service contribution methodology.

III. Further Notice of Proposed Rulemaking

The FCC further seeks comment on expanding the FCC's Number Resource Utilization and Forecast (NRUF) data collection to all providers who are required to contribute to the universal service fund based on Assessable Numbers.[76] As the FCC explains, the NRUF is currently only a requirement of telecommunications carriers that receive numbering resources from the North American Numbering Plan Administrator (NANPA) or another telecommunications carrier. NRUF requires a telecommunications carrier to report the actual utilization of its assigned numbers by thousands-block and to forecast a future need for telephone numbers. Those carriers who are not currently deemed telecommunications carriers by the FCC, such as VoIP providers, receive their telephone numbers from other reporting carriers who are subject to the NRUF requirement but the VoIP provider is not. As the Ohio Commission has previously advocated to the FCC, all providers who receive numbering resources should be subject to the NRUF

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[75] FCC 08-262 Combined FNOPR, Appendix A at 128-129, Appendix B at 76-77, and Appendix C at 124-125.

[76] FCC 08-262 Combined FNOPR, Appendix A at 344, Appendix C at 341.

requirements so that the FCC and State Commissions can obtain information as to a carrier's actual utilization of numbers assigned to it.[77] The proposal to utilize a numbers-based system for universal service contribution only makes these issues more critical, and obtaining NRUF information through an intermediary or third party carrier often leads to doubt about the reliability of the underlying information.

As the FCC is aware, NRUF is a well organized and time-tested data collection system that provides a readily available tool to track the status of a carrier's number utilization. The FCC does not have to expend time and resources to create something new when a reliable collection method currently exists. The only change necessary would be to amend the current FCC rules to define the term Assessable Numbers and to enable collection of data from all providers that assign an assessable number. Thus, the Ohio Commission recommends the expansion of the NRUF requirement to all providers as proposed in Appendices A and C, consistent with these comments. If, however, the FCC decides to adopt the narrow universal service proposals found in Appendix B, the Ohio Commission sees no harm in expanding NRUF in the Appendix B proposal as well, as an additional check on the accuracy of the information provided in the required monthly FCC Form 499. While the FCC states in all three Appendices that it may require submission of NRUF data as additional verification of a carrier's number utilization as report,

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[77] *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers, IP-Enabled Services, Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Final Regulatory Flexibility Analysis, Numbering Resource Optimization*, WC Docket No. 07-243, WC Docket No. 04-96, CC Docket No. 95-116, CC Docket No. 99-200 (Comments of the Public Utilities Commission of Ohio at 5-6) (March 24, 2008) (hereinafter "Ohio 2008 Numbering Comments").

without a requirement to report NRUF data, such carrier will not possess this information.

IV. Broadband Policy Issues

The proposals in Appendices A and C identify some policy issues that should be addressed, regardless of whether the universal service support for broadband is separated from basic telephone service support (as it should be), or is incorporated into telephone high cost support.

In principle, the Ohio Commission agrees with the FCC's conclusion that an entity receiving Universal Service Fund support for broadband service "cannot use satellite broadband technology to meet its obligations."[78] This proposal is a reasonable expectation for the reasons noted in the Appendices and is consistent with State of Ohio and other state initiatives in broadband mapping.[79]

In general, the Ohio Commission supports the OPASTCO/WTA proposal creating a "limited automatic exception for high-cost loops" for rural rate-of-return incumbent LECs.[80] The Ohio Commission sees this "limited automatic exception for high-cost loops" as a default for the most extreme instances.

In addition, the Ohio Commission strongly supports the premise that, to the extent such a waiver may be granted (or be automatically available), an entity receiving Univer-

78 FCC 08-262 Combined FNOPR, Appendix A at 27, Appendix C at 27.

79 The Ohio Commission notes that this proposal is consistent with how Connect Ohio collects broadband information for mapping purposes: ftp://ftp.connectohio.org/COPublic/ConnectOhio_Mapping/StatewideMaps/OH_Statewide_Broadband.jpg.

80 FCC 08-262 Combined FNOPR, Appendix C at 27 and Footnote 90.

sal Service Fund support for broadband service may not charge a higher price to customers served by satellite than it charges to customers served by another broadband technology.[81] This is supportive of the premise that universal access to broadband internet service, regardless of the technology used, should be affordable; in order to further adoption levels in these unserved high cost areas.

The Ohio Commission is also concerned about the Tiers identified in Appendices A and C.[82] While some benchmark is necessary for identifying what constitutes a truly "broadband" service for the purpose of receiving universal service support, benchmarks of this sort often take on a life of their own, outside of their designated context. While the asymmetrical tiers (200 mbps upload and varying download speeds) proposed are sufficient for many purposes and may be good criteria for a fundamental broadband service, they may not be sufficient or appropriate in other contexts. The Commission should (a) clearly identify that these Tiers of service are only of import in the context of universal service for broadband, and (b) establish a process whereby the Tiers are periodically reviewed so that they keep pace with changing needs and expectations.

V. Intercarrier Compensation Reform

In addition to the Universal Service Fund proposals contained within all three Appendices, Appendices A and C contain proposals to restructure and reform the current system of intercarrier compensation. In its previous comments, the Ohio Commission

[81] FCC 08-262 Combined FNOPR , Appendix A Footnote 88, Appendix C Footnote 89.

[82] FCC 08-262 Combined FNOPR , Appendix A at 45, Appendix C at 45.

has advocated a consistent and technologically neutral structure for intercarrier compensation, an adequate timeframe for the transition to such a new system, and a reasonable opportunity for carriers to recover revenues from other sources. It is in the context of these earlier comments that the Ohio Commission believes that the proposed structure for intercarrier compensation, though fraught with issues, provides a reasonable framework for true intercarrier compensation reform. The Ohio Commission's comments will focus on four aspects of the proposals, the overall structure and transition plan, the new "additional cost standard," dealing with incorrectly attributed (or unattributed) transit traffic (*i.e.* measures to ensure proper billing), and the structure of the revenue recovery opportunities provided.

A. Structure and Transition

In recent years, the use of new and innovative technologies to carry communications traffic has increased dramatically. Recognizing this, the Ohio Commission has, in prior comments to the FCC, generally advocated that intercarrier compensation requirements be technologically and competitively neutral. That is, any compensation requirement should apply equally to all providers exchanging traffic, regardless of the network technology used to originate, transmit, or terminate the traffic, *e.g.*, PSTN, wireless or packet-based. Upon its analysis of the plan,[83] the Ohio Commission believes that the proposal for a single uniform access rate across the state is consistent with these principles. The Ohio Commission believes that a competitively neutral intercarrier compensation

[83] FCC 08-262 Combined FNOPR, Appendix A at 194, Appendix C at 189.

reform plan, in terms of the type of carrier and underlying technology being used, is needed to fully realize effective intercarrier compensation reform. The Ohio Commission believes that drawing no distinction between the type of traffic being exchanged will simplify the regulatory process and minimize arbitrage opportunities available to carriers.

In the Ohio Commission's comments in regard to the Missoula Plan,[84] we agreed with the Missoula Plan's supporters that intercarrier compensation reform is necessary, but stated that it should be carried out in a more measured and balanced manner than that proposed in the Plan. The Ohio Commission believes that the Appendix A and C proposal's ten-year transition period[85] is a significant improvement over the Missoula Plan (or other previously proposed plans) as it will allow for a more balanced and measured restructuring of intercarrier compensation rates. The Ohio Commission believes that a ten-year transition period should be long enough for any carrier to adjust their business plans, as long as State Commissions are enabled to implement the transition in a balanced and measured manner.

The Ohio Commission believes that any reform plan that is adopted must preserve state authority over intrastate intercarrier compensation. The Ohio Commission therefore supports the plan's directive that states will be responsible for adopting the interim uniform reciprocal compensation rate, the final reciprocal compensation rate and the six-year

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84 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Comments of the Public Utilities Commission of Ohio at 18-19) (May 23, 2005) (hereinafter "PUCO 5/23/05 01-92 Comments"); *Id*. (Comments of the Public Utilities Commission of Ohio) (October 25, 2006) (hereinafter "PUCO 10/25/06 01-92 Comments").

85 FCC 08-262 Combined FNOPR, Appendix A at 192, Appendix C at 187.

glide path between the two rates.[86] The Ohio Commission believes that it is in the best position to evaluate the telecommunications market in Ohio. As the Ohio Commission continually works with and has regular contact with carriers operating and seeking to operate in Ohio, the Ohio Commission believes it is uniquely qualified to assess the Ohio telecommunications market. With this knowledge, the Ohio Commission believes it is be best situated to establish intercarrier compensation rates and a glide path to a unified intercarrier compensation rate that will be least disruptive to carriers and consumers in Ohio. The Ohio Commission reiterates that any intercarrier compensation plan adopted must allow states to set intrastate intercarrier compensation rates.

While the Ohio Commission believes that the proposed structure and transition plan for intercarrier compensation are reasonable and equitable, there is a troubling aspect to the structure that comes not from the proposed structure itself, but from the legal basis for making the transition. In addition to being contrary to the clear meaning of the Act, as is discussed above, the declaration that IP/PSTN services are "information services" creates a result that is contrary to the FCC's stated goals for reformed intercarrier compensation, competitive neutrality[87] and reducing regulatory arbitrage.[88]

Indeed, the declaration creates a kind of regulatory arbitrage[89] by incenting carriers to choose a technology based on the regulatory environment or cost outcome they

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86 FCC 08-262 Combined FNOPR , Appendix A at 194, Appendix B at 189.

87 FCC 08-262 Combined FNOPR , Appendix A at 126, Appendix C at 122.

88 FCC 08-262 Combined FNOPR , Appendix A at 239, Appendix C at 234.

89 While the FCC has used the term "regulatory arbitrage" to refer strictly to distinctions between rates, the concept of arbitrage includes the avoidance of costs of all forms.

would prefer. Indeed, in contrast to competitive neutrality, the FCC gives carriers already using IP/PSTN conversion a "head start" in the competitive race. By "maintaining the status quo for this traffic during the transition,"[90] the FCC makes any carrier already using IP/PSTN conversion, as well as any carrier able to make the transition quickly, immediately exempt from paying intercarrier compensation. Those carriers not already using IP/PSTN conversion will be scrambling to implement it so they can avoid paying access charges for at least the next 10 years, while other carriers are left behind to struggle through the transition.

It is difficult to imagine an outcome less competitively neutral, or more fraught with regulatory arbitrage, than the outcome that would result from the FCC's proposal in this regard. One can hardly imagine a process less economically efficient than having a network engineering decision driven even partially by a preference for one regulatory environment over another.

There are carriers that prefer operating as a telecommunications carrier under regulation. Their business model expects and requires it, as do their investors. These carriers would oppose an otherwise efficient transition to IP-based systems in order to avoid a declaration that they are "information services" and therefore unregulated. Going from a regulated to a competitive mode of operation is an economic and business decision that they ultimately may have to make, but it should not be forced upon them by

[90] FCC 08-262 Combined FNOPR, Appendix A at Footnote 564, Appendix C at Footnote 555.

regulatory fiat. They certainly would have a legitimate complaint with the FCC giving their competitors a 10 year head start.

B. Additional Cost Standard

In the *Local Competition First Report and Order*,[91] the FCC adopted implementing rules interpreting section 252's pricing standards for interconnection and UNEs (section 252(d)(1)), and for reciprocal compensation (section 252(d)(2)). In setting the pricing methodology for interconnection and UNEs, the FCC directed the states to employ a forward-looking, long-run average incremental cost methodology, known as TELRIC.[92] In its current proposal, the FCC observes that market development since the adoption of TELRIC pricing methodology has demonstrated that the TELRIC methodology led to excessively high reciprocal compensation rates, which provided an incentive to certain carriers to develop business plans to take advantage of such above-cost rates by becoming net recipients of local traffic. The Commission then concludes that evidence indicates that application of the TELRIC methodology to reciprocal compensation has not led to rates that accurately reflect a carrier's "additional costs" as the FCC initially envisioned and Congress intended.[93] In its proposal, the FCC concludes that the traditional economic definition of incremental cost, as applied to multiproduct firms, is most appro-

91 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (hereinafter "Local Competition First Report and Order").

92 FCC 08-262 Combined FNOPR, Appendix A at 238.

93 *Id.* at 239.

priate for calculating "additional costs" to set final reciprocal compensation rates.[94] The Commission's proposal identified specific requirements for the states to identify the traffic-sensitive incremental cost of transport and termination of traffic, such as the use of least cost, most efficient network technology (*i.e.* softswitch and fiber optic cable), and the exclusion of all common costs including overhead allocations.[95]

In prior comments, the Ohio Commission has repeatedly recommended that cost-based compensation rates recover only traffic-sensitive costs of the network, regardless of the network technologies used (TDM-based, wireless, and packet-based), to satisfy the "additional cost" pricing standard under section 252(d)(2)(A).[96] Also, in prior comments, the Ohio Commission recommended the use of the TELRIC methodology for developing cost-based rates for transport and termination due to industry familiarity with that methodology as an established, well-developed method, which had already been approved as being lawful by the Supreme Court.[97] Although the Ohio Commission recommended TELRIC to be used as the basis for the cost-based rates for transport and termination in our prior comments, we similarly observe the market developments and technological changes and concur with the FCC's proposed adoption of traditional incremental cost as the standard to satisfy the "additional cost" pricing standard under section 252(d)(2)(A).

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[94] *Id*. at 240, 262.

[95] FCC 08-262 Combined FNOPR, Appendix A at 271-273.

[96] PUCO 10/25/06 01-92 Comments at 28.

[97] PUCO 5/23/05 01-92 Comments at 20; PUCO 10/25/06 01-92 Comments at 30.

The Commission's proposal also requires each state to set a final single, uniform reciprocal compensation rate for all carriers in that state through their pricing proceedings that is at or below $0.0007 per minute-of-use,[98] and that the final uniform reciprocal compensation rates should be symmetrical.[99] The Ohio Commission finds the proposed symmetrical compensation arrangement to be consistent in principle with the Ohio Commission's carrier-to-carrier rules, and prior decisions in various arbitration cases regarding reciprocal compensation rates.

In our prior comments, the Ohio Commission has repeatedly recommended that cost-based compensation rates should be based on individual carrier's costs rather, than a single rate for all carriers, to satisfy the requirements of section 252(d)(2) of the Act.[100] The Ohio Commission observes, however, that under the proposed incremental cost approach (limited to the traffic-sensitive component of the network) and the reliance on a modern (optical fiber and softswitch) network, the resulting differences in the traffic-sensitive incremental cost among various carriers would indeed be *de minimis* and would not warrant the development of individual carrier reciprocal compensation rates. Therefore, the Ohio Commission concurs that a State-wide uniform rate would be reasonable, and more practical to administer, than rates calculated from the individual carrier's costs.

Although the Ohio Commission finds the State-wide uniform rate would be reasonable, the Ohio Commission takes issue with the $0.0007 cap established in the

98 FCC 08-262 Combined FNOPR, Appendix A at 198 and 274.

99 *Id*. at 276.

100 PUCO 5/23/05 01-92 Comments at 19-20; PUCO 10/25/06 01-92 Comments at 29.

proposed rule as it, in practical application, makes all other proposed principles (*i.e*. cost-based, incremental cost, statutory requirement of "additional cost," numerous state commissions cost-proceedings) hollow. It is not clear what would be the goal or the value of holding a costly and time consuming proceeding involving a state commission and all carriers in the state, to develop a cost-based uniform state-wide reciprocal compensation rate, if the outcome is predetermined. Although the FCC recognizes that the Supreme Court stated unequivocally that "this Court has never considered a taking challenge on a rate setting methodology *without* being presented with *specific rate orders* alleged to be confiscatory . . . . ,"[101] it is not clear how a State commission could deal with a situation where the outcome of its state-wide cost proceeding produced a rate that is higher than the proposed cap of $0.0007. For the State commission, it would be a no win situation, as the State commission would be either in violation of the FCC rate-capping rule if it attempts to enforce the calculated rate, or be subjected to a takings challenge in the courts if it attempts to require carriers to charge a reciprocal compensation rate that is less than the rate produced through a cost proceeding. The Ohio Commission strongly recommends that State commissions be charged with setting a state-wide uniform reciprocal compensation rate based on a record it develops, as guided with the incremental cost methodology proposed by the FCC, with no cap requirement.

Along with the final uniform reciprocal compensation rate, the FCC proposes to establish default rules regarding the network "edge," which it claims would not require

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[101] FCC 08-262 Combined FNOPR, Appendix A, Footnote 714, citing *Verizon v. FCC*, 535 U.S. at 524.

changes to physical points of interconnection, but would simply define functions governed by a uniform terminating rate.[102] The Ohio Commission has repeatedly objected to the network "edge" concept as it may, considering the uniform and symmetrical reciprocal compensation rate, cause a need to change the physical points of interconnection and upset hundreds of existing interconnection agreements. As the Ohio Commission has repeatedly pointed out, in these existing interconnection agreements, carriers negotiated points of interconnection that make efficient use of their respective network resources, allow for recovery of the investment in these resources, and are mutually agreed upon.[103] Additionally, the proposed network "edge" rules clearly ignore the existence of "transit arrangements" and the "transit traffic providers" and do not address how these carriers will be compensated, albeit using the future network architecture.

It seems that the proposed network "edge" rules are written with the presumption that "transit arrangements" and "transit traffic providers" would not exist in the future packet-based networks, which is, at best, speculative. Additionally, the Ohio Commission notes that CMRS providers, as well as Competitive LECs and VoIP providers, typically establish indirect interconnection with small and rural incumbent LECs through an interconnection with a large incumbent LEC's network; thus, these carriers effectively dictate the location of the point of interconnection without any input or choice from the small incumbent LEC. Again, the proposed default network "edge" rules clearly overlook such situations. Even if the pricing is to be based on an idealized network architec-

102 FCC 08-262 Combined FNOPR, Appendix A at 275.

103 PUCO 5/23/05 01-92 Comments at 13-15; PUCO 10/25/06 01-92 Comments at 22-25.

ture, the application of that pricing must take into account the actual way in which carriers interconnect.

Finally, we observe that the FCC's proposal deals with the reciprocal compensation for termination of traffic only, not with the reciprocal compensation for *transport and* termination of traffic as required by Sections 251(b)(5) and 252(d)(2) of the Act. Absent specific rules that address "transit arrangement" and the "transit traffic providers," the Ohio Commission strongly recommends that the existing interconnection rules and points of interconnection be left in place until such time as the FCC addresses "transit arrangements" and the "transit traffic providers" in more detail.

C. Measures to Ensure Proper Billing

In this section, the FCC states that the current intercarrier compensation mechanism has presented opportunities and incentives for service providers to misidentify, mislabel or otherwise conceal the source of traffic to avoid or reduce payment to other service providers. The FCC takes steps in its proposal to ensure that traffic is appropriately labeled and to subject providers to financial responsibility for the mislabeled or unidentified traffic.[104]

According to the FCC discussion in Appendices A and C, when the originating and terminating networks are not directly connected, but instead use an intermediate or transit provider, complications can arise with the forwarding of the billing information to the terminating provider. The FCC points out that in some instances, the traffic routed

104 FCC 08-262 Combined FNOPR, Appendix A at 326-327, Appendix B at 322-323.

through an intermediate provider does not, whether intentionally or unintentionally, include calling party number (CPN), charge number (CN) or other information identifying the calling party.[105]

In order to remedy these issues, the FCC's proposals require that providers populate (and are prohibited from stripping or altering) CPN information, (or CN if the CN differs from CPN information) at any point in the call signaling stream. The FCC also proposes that this requirement apply to all traffic originating or terminating on the PSTN including both intra- and interstate traffic.[106] Next, the FCC permits terminating providers that receive traffic lacking the required information to bill the service provider that delivered the traffic to the terminating provider at the terminating company's highest termination rates in effect at the time the traffic was received. If there is a transiting or intermediate provider involved in the call, the transiting carrier can bill the originating provider for the charges it received from the terminating provider.[107]

The Ohio Commission strongly supports and applauds the FCC's proposals to ensure proper billing in order to remedy a host of issues including a problem commonly known in the industry as "phantom traffic." The Ohio Commission previously provided comments to the FCC highlighting our concern with this issue, especially the traffic that is delivered to our small or rural ILECs in Ohio via a transit traffic arrangement, and the

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105 FCC 08-262 Combined FNOPR, Appendix A at 327-328, Appendix B at 323-324.

106 FCC 08-262 Combined FNOPR, Appendix A at 330-333, Appendix B at 326-329.

107 FCC 08-262 Combined FNOPR, Appendix A at 336-341, Appendix B at 332-337.

need for the FCC to address this problem with or without ICC reform.[108] In an earlier set of comments, we highlighted the difficulty of small or rural ILECs receiving compensation for cellular traffic sent through an ILEC tandem. Specifically, we pointed out that in 2004, a total of approximately 15-20 million cellular minutes were terminated on small Ohio ILEC networks without compensation.[109] In order to attempt to resolve this issue, the Ohio Commission adopted a new rule in 2007 that required all carriers exchanging intrastate traffic, including transiting carriers, to transmit the telephone number of the party originating the call without alteration in the network signaling information, where available and technically feasible.[110] Of course, since the Ohio Commission rules only apply to intrastate traffic, the Ohio Commission is pleased to see that the FCC is proposing to take action to eliminate any remaining phantom traffic or otherwise mislabeled or unidentified traffic issues for all traffic and providers.

Ultimately, it is our hope, as it is the FCC's, that the overall reform of the intercarrier compensation system should significantly reduce the incentives and opportunities to engage in the type of activities that this proposal seeks to eliminate. However, in the interim until the reform is completed, and as an as yet unforeseen incentive still may exist after reform has been finalized, the Ohio Commission urges the FCC to adopt its proposal

[108] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Comments of the Public Utilities Commission of Ohio at 1-5) (December 2, 2006) (hereinafter "PUCO 12/7/06 01-92 Comments").

[109] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92 (Comments of the Public Utilities Commission of Ohio at 31) (May 23, 2005) (hereinafter "PUCO 5/23/05 01-92 Comments").

[110] *In the Matter of the Establishment of Carrier-to-Carrier Rules, et al*, PUCO Case Nos. 06-1344-TP-COI, *et al*. (Opinion and Order) (August 22, 2007) (established as Ohio Administrative Code, 4901:1-7-12 (B)(2)).

on Measures to Ensure Proper Billing as set forth in Appendices A and C, if necessary, independent of other intercarrier compensation reform.

D. Revenue Recovery Opportunities

1. End-User Charges

The FCC proposes to permit incumbent LECs to increase their interstate SLCs up to new caps to recover reductions in interstate intercarrier compensation revenues (increase the SLC cap for residential and single-line business lines from $6.50 to $8.00, the non-primary residential line SLC cap from $7.00 to $8.50, and the multi-line business SLC cap from $9.20 to $11.50). To the extent that an incumbent LEC increases its inter-state SLCs to recover reductions in its interstate intercarrier compensation revenues, and if any of its interstate SLCs are still below the relevant caps, the FCC proposal allows those incumbent LECs to raise their interstate SLCs further, up to the caps, to recover any net loss in intrastate intercarrier compensation revenues. The FCC preconditions such additional increase on an LEC's state retail rates and any intrastate SLC being set at the maximum level permitted under state regulations. Further, the FCC mandates that any increase in interstate SLC revenues that are intended to recover lost intrastate intercarrier compensation revenues be used by the state in ratemaking to reduce costs or revenue requirements to be recovered in the intrastate jurisdiction.[111]

The Ohio Commission has several major concerns with the proposed access rev-enue recovery plan. As discussed earlier, it interferes with states' authority to rebalance

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111 FCC 08-262 Combined FNOPR, Appendix A at 298-299, Appendix C at 293-294.

rates in the intrastate jurisdiction to account for any needed intrastate revenue loss due to the intercarrier compensation reform. The Ohio Commission strongly recommends the adoption of a far simpler and more direct alternative, which is that any increase in the interstate SLC be used only to recover any reduction in interstate intercarrier compensation revenues, and to leave it to each state to address lost intrastate intercarrier compensation revenues as appropriate under state law.

This is the most logical and efficient plan of action especially in light of the proposed 10 year transition plan in which states are charged to administer the intercarrier compensation rate reduction through the various proposed stages. Under the proposed transition plan, the FCC charges the state commissions with setting an interim state-wide reciprocal compensation rate, the development of a final uniform cost-based state-wide reciprocal compensation rate, and the glide path to reach that final rate. Accordingly, State Commissions will have a better understanding, each step along the transition period, of the level of the incumbent LECs' intercarrier compensation rate reduction and the level of additional intrastate revenue recovery needed along each step.

Additionally, according to the FCC's transition plan, during the first two years of the plan incumbent LECs will experience only intrastate revenue reduction, and no interstate revenue reduction. Incumbent LECs would not experience interstate rate reduction until the beginning of the third year of the transition plan. The Commission's proposed revenue recovery mechanism provides for the incumbent LECs the ability to raise their interstate SLCs *first* to recover interstate revenue loss, and further raise its interstate SLCs, up to the caps, *only if* any of its interstate SLCs are still below the relevant caps, to recover any net loss in intrastate intercarrier compensation revenues (with some prerequisites). The proposed revenue recovery mechanism does not address the ILECs' ability to recover its intrastate revenue loss, if needed, during the first two years. It is the state commission that has the authority and the responsibility to balance the need to ensure reasonable intrastate revenue recovery by carriers against the potential adverse impact on consumers of increased end-user charges.

The FCC's proposed revenue recovery mechanism shifts the burden of revenue recovery to end-users without any evaluation of the amount of revenue that needs to be recovered. Additionally, even if section 251(g) empowers the FCC to subject traffic previously encompassed by section 251(g) to the reciprocal compensation regime of section 251(b)(5), including providing for an orderly transition as the FCC claims,[112] it does not provide it with the power to preempt the states' authority to establish the appropriate mechanism to recover intrastate revenue lost, as long as it is consistent with the requirements of section 251, and does not substantially prevent the implementation of that section.[113]

2. Universal Service Support

The FCC proposes to include additional universal service funding available to incumbent LECs only, not for competitive carriers, to keep retail rates affordable while ensuring that maintaining affordable rates does not unduly threaten the financial viability

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112 *See* FCC 08-262 Combined FNOPR, Appendix A at 300.

113 47 U.S.C. § 251(d)(3) (2008).

of rate-regulated incumbent LECs as a result of the proposed intercarrier compensation reform.[114]

Under the Appendix A proposal, as a precondition for receiving new universal service support due to intercarrier compensation reform, the FCC requires any carrier – whether price cap or rate-of-return – to show that its federal SLC, state SLC (if any), and state retail local service rates are at the maximum levels permitted under existing applicable law.[115] Under the FCC's proposal, an incumbent LEC subject to rate-of-return regulation may qualify for universal service funding only if the ILEC can demonstrate that it will not have a reasonable opportunity to earn its authorized rate of return as a result of its net loss of revenues caused by intercarrier compensation reform, even after having increased its interstate SLC, state SLC (if any), and state retail local rates to the maximum permitted by applicable law.[116] The FCC observes that new and growing sources of revenues should mitigate the impact of intercarrier compensation reform for rural and other carriers.[117] Therefore, under the FCC's proposal, an incumbent LECs subject to price cap regulation may qualify for universal service funding if the ILEC can demonstrate that, after accounting for increased end-user charges, it is still unable to earn a "normal profit." In determining whether this criterion is met, the FCC will evaluate the

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[114] FCC 08-262 Combined FNOPR, Appendix A at 319, Appendix C at 315.

[115] FCC 08-262 Combined FNOPR, Appendix A at 319.

[116] FCC 08-262 Combined FNOPR, Appendix A at 322.

[117] *Id.* at 313.

total costs and total revenues of the company as a whole, including those from both regulated and non-regulated sources.[118]

Under the FCC's proposal in Appendix C, as each incumbent LEC subject to rate-of-return regulation must be provided a reasonable opportunity to earn its authorized rate of return, the only precondition for such a carrier receiving supplemental universal support as a result of its net loss of revenues caused by intercarrier compensation reform, is that they are under rate-of-return regulation in the interstate jurisdiction. Additional support for all of the revenues lost as a result of intercarrier compensation reform would be available only to those rural rate-of-return incumbent LECs that have committed to the five-year broadband build-out requirement.[119]

The Ohio Commission is supportive of the concept of targeting additional universal service support to those carriers who truly need support, and the identification of when they need such support, as outlined in Appendix A, is a reasonable approach. However, the Ohio Commission has concerns, as discussed elsewhere in this document, regarding the conditioning of universal service fund support (whether basic high-cost support, or additional support to recover revenue losses) to rural rate-of-return incumbent LECs on a commitment to the five-year broadband build-out requirement, as outlined in Appendix C.

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118 *Id*. at 323-324.

119 FCC 08-262 Combined FNOPR, Appendix C at 320-32.

CONCLUSION

While the FCC is to be applauded for taking action on Intercarrier Compensation and USF Reform, there are a number of items within the three proposals that may well create, rather than resolve, problems in those areas. On the whole, the more limited proposal presented in Appendix B, while not perfect from the Ohio Commission's perspective, is a far better and more measured step forward. The proposals for Intercarrier Compensation reform presented in Appendices A and C, while structurally sound, contain problems in the details of implementation, particularly with regard to the treatment of IP/PSTN carriers and their traffic, and the recovery of revenues foregone in the transition of access charges, that will result in more harm than good. These issues require further consideration.

Respectfully submitted,

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